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David Westfall

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FORCING INCIDENTS OF MARRIAGE ON
UNMARRIED COHABITANTS: THE AMERICAN
LAW INSTITUTE'S *PRINCIPLES OF*
FAMILY DISSOLUTION

*David Westfall**

INTRODUCTION

The most important recent development in the areas addressed by the *Marvin*¹ decision is the approval last year and impending publication of the American Law Institute's *Principles of the Law of Family Dissolution*.² The *Principles*' treatment of relationships between "domestic partners"³ and of partners' agreements⁴ to modify the financial consequences that would otherwise follow from the termination of their relationships must reflect a profound distrust for individuals' efforts to set the terms for intimate relationships to meet their own needs. Instead, the *Principles* would generally mandate for them the same rights and obligations for division of marital property and alimony (renamed "compensatory spousal payments") that the *Principles* would create on dissolution of marriage.⁵ Although analysis of chap-

* John L. Gray Professor of Law & Carl F. Schipper, Jr., Professor of Law, Harvard Law School. A.B. 1947, University of Missouri; LL.B. 1950, Harvard Law School. I gratefully acknowledge the helpful comments and suggestions of Charles Donahue, Jr., Mary Ann Glendon, Robert J. Levy, Peter L. Murray, John Sheldon, and Harry Tindall. Jeremy A. Younkin, of the Harvard Law School Class of 2002, provided excellent research assistance.

1 *Marvin v. Marvin*, 537 P.2d 106 (Cal. 1976).

2 *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* (Tentative Draft No. 4, 2000) [hereinafter *ALI PRINCIPLES* (Tentative Draft 2000)]. The *Principles* were approved by the members of the American Law Institute at its annual meeting. As the final version of the *Principles* was not available when this Essay went to press, unless otherwise indicated, all references herein to *Principles* are to Tentative Draft No. 4.

3 *See id.* §§ 6.01–.06.

4 *See id.* §§ 7.01–.18.

5 These claims relate both to the division of property on dissolution and compensatory spousal payments. The principal provisions dealing with these topics are

ters dealing with those matters is outside the scope of this Essay,⁶ their animating impetus is clear: to enhance and safeguard the rights of dependent spouses and cohabitants and to diminish the possibility that those rights may be reduced or eliminated by an agreement of the parties.

If there were any persuasive reason to believe that the *Principles* actually reflected the views of a substantial majority of the almost three thousand distinguished judges, lawyers, and law teachers who are members of the American Law Institute, I would hesitate to write a critical essay.⁷ In fact, however, there is no way to know whether the *Principles* reflect the views of more than a minor fraction of the membership. Although the Institute's Bylaws require authorization by the membership and approval by the Council for publication of any work as representing the Institute's position,⁸ "[a] quorum for any session of a meeting of the members is established by registration during the meeting of one-fifth of the voting members."⁹ Thus, the quorum requirement is satisfied for all sessions of the meeting as soon as one-fifth have registered, even though the number of members present and voting at a given session is substantially smaller. A majority voting on any question "is effective as action of the membership,"¹⁰ and the Bylaws make no provision for proxy voting. As a result, fundamental matters of policy may be decided by the votes by only a small part of the membership. For example, a motion to recommit a proposed section in Chapter 4 that would recharacterize individual property as marital property on the basis of the passage of time, and thereby subject such property to division by the parties on dissolution of their marriage, was defeated at the 1995 meeting by a vote of only 101 to

included in *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* chs. 4-5 (Proposed Final Draft, Part I, 1997) [hereinafter *ALI PRINCIPLES* (Proposed Final Draft 1997)], although minor revisions of both chapters are included in the recent tentative draft. See *ALI PRINCIPLES* (Tentative Draft 2000), *supra* note 2, at 61, 353.

6 For comments on earlier drafts of these chapters, see J. Thomas Oldham, *ALI Principles of Family Dissolution: Some Comments*, 1997 U. ILL. L. REV. 801.

7 I should acknowledge my own miniscule role in the "Members Consultative Group" for the *Principles*. After one meeting, it became clear to me that the Group and the Reporters were marching to a very different beat and that my efforts to alter their views would be futile. I tried again at the May 2000 Annual Meeting, introducing three motions to amend chapters six and seven, but they were all defeated by voice votes.

8 See *ALI, 2000 ANNUAL REPORTS OF THE INSTITUTE*, Bylaw § 6.01, at 61, 64 (2000).

9 *Id.* § 3.02, at 61, 62.

10 *Id.* § 3.04, at 61, 64.

95.¹¹ Thus, although the *Principles* represents the official position of the ALI, it may not reflect the views of even a substantial minority of the membership.

In joining a growing chorus of critics of other recent work of the Institute,¹² I do not suggest, as some have of other Institute projects, that the *Principles* are overly responsive to the concerns of a particular self-interested constituency. Nor can the *Principles* be faulted, as was a recent Reporter's Study, for becoming "mired in technical detail and overly cautious."¹³ Indeed, the Reporters have not hesitated to sweep with a broad brush and to recommend wholesale departures from the developing law.

Although one of the stated objectives of the *Principles* is to allow the parties to "accommodate their particular needs and circumstances,"¹⁴ this welcoming overture is severely limited by the caveat that follows: "subject to constraints that recognize competing policy concerns and limitations in the capacity of parties to appreciate adequately, at the time of the agreement, the impact of its terms under different life circumstances."¹⁵ Adoption of this restrictive approach would run counter to a growing willingness of courts and legislatures to empower couples to structure their intimate relationships to reflect their individual needs. Moreover, applying the same standard of review to agreements between nonmarital cohabitants and prospective spouses flies in the face of a fundamental difference between the ways in which the rights and obligations of the parties are established in these sharply contrasting situations.

Prospective spouses who agree to modify the rights and obligations that they would otherwise incur surely know, at least in general terms, that such rights and obligations are created the moment the parties marry, although the state law that will ultimately define those rights and obligations is largely determined by where they spend their

11 See 72 ALI, ANNUAL MEETING PROCEEDINGS 128, 142 (1995).

12 See, e.g., Alex Elson & Michael L. Shakman, *The ALI Principles of Corporate Governance: A Tainted Process and a Flawed Product*, 49 BUS. LAW. 1761 (1994); Monroe H. Freedman, *Caveat Lector: Conflicts of Interest of ALI Members in Drafting the Restatements*, 26 HOFSTRA L. REV. 641 (1998); Carol B. Swanson, *Juggling Shareholder Rights and Strike Suits in Derivative Litigation: The ALI Drops the Ball*, 77 MINN. L. REV. 1339 (1993); Frank J. Vandall, *The American Law Institute Is Dead in the Water*, 26 HOFSTRA L. REV. 801, 802 (1998) (asserting the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) "reads like a wish list for manufacturing America").

13 Jeffrey O'Connell & Chad M. Oldfather, *A Lost Opportunity: A Review of the American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury*, 30 SAN DIEGO L. REV. 307, 307 (1993).

14 ALI PRINCIPLES (Tentative Draft 2000), *supra* note 2, § 7.02.

15 *Id.*

married life. In contrast, nonmarital cohabitants may fail to realize not only that their relationship carries the potential for major legal consequences, but also that their existence and extent depends both on which state's law governs and on the way in which their relationship develops. Nevertheless, the *Principles* would impose obligations on many cohabitants which could be avoided only by an express agreement that satisfies requirements identical to those applicable for agreements between prospective spouses.¹⁶ Imposing marital obligations on parties in an informal relationship is wholly at odds with some of the potentially liberating implications of the *Marvin* court's decision.

I. COHABITANTS' CONTRACTS AND CLAIMS AFTER *MARVIN*

In *Marvin*, the California Supreme Court was explicit in recognizing cohabitants' contractual capacity:

In summary, we base our opinion on the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights. Of course, they cannot lawfully contract to pay for the performance of sexual services . . .¹⁷

Unfortunately, the court followed with qualifying language that may be read to constrict cohabitants' contractual freedom. It quoted from a prior dissenting opinion admonishing the court to presume "that the parties intend to deal fairly with each other"¹⁸ and to inquire into the parties' "conduct"¹⁹ and "the nature of their relationship."²⁰ Both caveats are troubling.

"Fairness" has an intuitive appeal as a touchstone to resolve contractual ambiguities. The courts' response to extreme unfairness, even in the absence of ambiguity, is reflected in the doctrine of "unconscionability" as a basis for refusing to enforce particular contract

16 See *infra* notes 83-85.

17 *Marvin v. Marvin*, 557 P.2d 106, 116 (Cal. 1976). The *Marvin* opinion has been the subject of many comments. For a particularly thoughtful analysis of its possible implications, see Herma Hill Kay & Carol Amyx, *Marvin v. Marvin: Preserving the Options*, 65 CAL. L. REV. 937 (1977). See also Christina M. Fernández, Note, *Beyond Marvin: A Proposal for Quasi-Spousal Support*, 30 STAN. L. REV. 359, 363 (1978) (suggesting that the next development in de facto marriage property settlement should allow for support payments); Comment, *Property Rights Upon Termination of Unmarried Cohabitation: Marvin v. Marvin*, 90 HARV. L. REV. 1708, 1714 (1977) (arguing *Marvin* will "mak[e] cohabitation a more attractive and flexible arrangement").

18 *Marvin*, 557 P.2d at 121 (citations omitted).

19 *Id.* at 110.

20 *Id.* at 117 n.11.

terms or even an entire agreement.²¹ However, reliance on unfairness that falls short of unconscionability as justification for revising contracts, or refusing to enforce them, may lead to a wholesale interference with private contracting because of wide ranging judicial perceptions of what is "fair."²² Indeed, the disturbing consequences of unbridled judicial discretion in this area are illustrated by the subsequent history of the *Marvin* case on remand. The trial court, apparently relying in part on the statement of the California Supreme Court that its opinion "does not preclude the evolution of additional equitable remedies to protect the expectations of the parties,"²³ awarded Michelle Marvin \$104,000 for her economic "rehabilitation."²⁴ However, the California Court of Appeal reversed the award, holding that it went beyond the issues framed by the pleadings.²⁵ That court also relied on the trial court's findings that Michelle Marvin benefited socially and economically from the relationship, that Lee Marvin never had an obligation to pay for her maintenance, and that he was not unjustly enriched.²⁶

The findings just referred to illustrate the objectionable consequences of the inquiry directed by the California Supreme Court into the parties' "conduct" and "the nature of their relationship." In addition to the subjective nature of the decision-making that such an inquiry invites, it can be both highly intrusive and financially burdensome for litigants. A critical comment by Professor David Chambers on the *Marvin* decision points out that the eleven-week trial generated 8000 pages of transcript, which included allegations of an affair between Michelle Marvin and another man and testimony concerning that man's alleged homosexual orientation, which he offered witnesses to rebut.²⁷ Chambers suggests that the decision invites the kinds of testimony about infidelity and abuse that the change to no-fault divorce sought to eliminate.²⁸ He suggests that the court should have limited enforcement to express written agreements and should

21 See U.C.C. § 2-302 (1989); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

22 See David L. Chambers, *The "Legalization" of the Family: Toward a Policy of Supportive Neutrality*, 18 U. MICH. J.L. REFORM 805, 824 (1985).

23 *Marvin*, 557 P.2d at 123 n.25; see *Marvin v. Marvin*, 176 Cal. Rptr. 555, 558 (Ct. App. 1981) (noting that the trial court seemed to have based its judgment on footnotes twenty-five and twenty-six).

24 *Marvin v. Marvin*, 5 Fam. L. Rep. (BNA) 3077, 3085 (Cal. Super. Ct. 1979), *rev'd*, 176 Cal. Rptr. 555 (Ct. App. 1981).

25 *Marvin*, 176 Cal. Rptr. at 558.

26 *Id.* at 559.

27 Chambers, *supra* note 22, at 825.

28 See *id.*

not have recognized implied contracts or created new equitable remedies.²⁹

The variety of remedies the *Marvin* court offered cohabitants is indeed broad.

The courts may inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract or implied agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may, when appropriate, employ principles of constructive trust or resulting trust. Finally, a nonmarital partner may recover in quantum meruit for the reasonable value of household services rendered less the reasonable value of support received if he can show that he rendered services with the expectation of monetary reward.³⁰

Of course, imposition of a resulting trust where one cohabitant contributes funds toward the acquisition of property held by the other cohabitant³¹ is merely an application in the context of cohabitation of general trust doctrine.³²

A vivid illustration of the kind of detailed inquiry into the most intimate aspects of cohabitants' lives that may result from assimilating nonmarital cohabitation to marriage is provided by a recent decision of the Supreme Court of Washington, *In re Marriage of Pennington*.³³ Although the case name refers to "marriage," the opinion in fact deals with two cases filed by females against their male cohabitants seeking to establish in each instance a "meretricious relationship"³⁴ so as to be entitled to a share of property accumulated while the relationship

29 *Id.* at 826. Another commentator has suggested that written agreements not only obviate many of the problems of proof that arise when a claim is based on an oral contract, but may also lead couples to consider more carefully the possible consequences of the dissolution of their cohabitation arrangement. See Twila L. Perry, *Dissolution Planning in Family Law: A Critique of Current Analyses and a Look Toward the Future*, 24 FAM. L.Q. 77, 116-18 (1990).

30 *Marvin v. Marvin*, 557 P.2d 106, 122-23 (Cal. 1976) (citations omitted).

31 See J. THOMAS OLDHAM, *DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY* § 1.02(5)(c) (2001).

32 See 5 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 440.1 (4th ed. 1987).

33 14 P.3d 764 (Wash. 2000).

34 In this context, Washington gives "meretricious relationship" an unusual meaning. Compare the definition in Black's Law Dictionary: "1. Involving prostitution; of an unlawful sexual nature <a meretricious encounter>. 2. (Of a romantic relationship) involving either two people of the same sex or lack of capacity on the part of one party <a meretricious marriage>" BLACK'S LAW DICTIONARY 1002 (7th ed. 1999).

continued.³⁵ Washington is one of the few states whose courts have discretion, when cohabitation that satisfies the requirements for such a relationship ends, to divide acquisitions from earnings while it continued.³⁶

After an exhaustive review of the facts of both cases, the *Pennington* court held that neither satisfied the requirements for a "meretricious relationship,"³⁷ which the court had characterized in a prior decision as a "stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist."³⁸ The court listed five factors to be considered in making the determination: continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and intent of the parties.³⁹

Examining these factors can lead to close scrutiny of the intimate details of the parties' lives. In one case, the parties' relationship spanned twelve years, but the male partner was married to someone else for the first five years and the parties' cohabitation included periods of separation, during one of which the female partner was living with another man.⁴⁰ The court found that the evidence did not support the conclusion that the parties had "the mutual intent to form a meretricious relationship."⁴¹

Although the *Principles* refer to "domestic partnership," rather than "meretricious relationship," the definition would sometimes permit the same kind of detailed inquiry into the most intimate aspects of

35 See *Connell v. Francisco*, 898 P.2d 831, 836-37 (Wash. 1995) (en banc). For a critical comment on the decision, see Gavin M. Parr, *What Is a "Meretricious Relationship"? An Analysis of Cohabitant Property Rights Under Connell v. Francisco*, 74 WASH. L. REV. 1243 (1999).

36 Other decisions relying on a status approach in distributing cohabitants' property after a long-term relationship include *Wilbur v. DeLapp*, 850 P.2d 1151, 1153 (Or. Ct. App. 1993), and *Shuraleff v. Donnelly*, 817 P.2d 764, 768 (Or. Ct. App. 1991). Similar results were reached in *Pickens v. Pickens*, 490 So. 2d 872 (Miss. 1986). In other cases, courts have relied on constructive trust doctrine to award a cohabitant a property interest. See, e.g., *Evans v. Wall*, 542 So. 2d 1055 (Fla. Dist. Ct. App. 1989); *Sullivan v. Rooney*, 533 N.E.2d 1372 (Mass. 1989). Citations for foreign jurisdictions that have reached similar results by including cohabitants, including same-sex partners, in the definition of spouse, are collected in ALI PRINCIPLES (Tentative Draft 2000), *supra* note 2, § 6.03 Reporter's Notes.

37 *Pennington*, 14 P.3d at 773.

38 *Id.* at 770 (quoting *Connell*, 898 P.2d at 834).

39 *Id.*

40 *Id.* at 771.

41 *Id.* A significant factor in the court's determination that no mutual intent to be in a meretricious relationship existed was that, while the female cohabitant insisted on marrying, the male cohabitant refused. *Id.*

the partners' lives⁴² to serve as a basis for treating the end of the relationship as if it were the dissolution of a marriage without regard to whether the partners had made the express written agreement Professor Chambers would require.⁴³ Of course, the reality probably is that express agreements between nonmarital cohabitants are relatively rare and usually are made for the purpose of negating, rather than defining, any rights based on the relationship.⁴⁴ Thus, if recovery is allowed only if such an agreement is made, most cohabitants probably will not have a legally enforceable claim when the relationship ends, or when one of the parties dies, unless it ripens into marriage. On the other hand, the reality also is that many marriages today are preceded by nonmarital cohabitation. If potential cohabitants become fearful that marital rights and obligations may attach, whether or not they marry, relationships that would have enriched the lives of both parties and that might have led to marriage may never be given a chance to develop.

An appealing case for statutory recognition of a right to recovery in the absence of any agreement providing for it is where one cohabitant pays for the education or training of the other. In the context of dissolution of marriage, the *Principles* would, under specified circumstances, award a spouse compensation for contributions to the other spouse's education or training,⁴⁵ and similar treatment may be appropriate for cohabitants who do not make an agreement dealing with the effect, if any, of such contributions.

A. Responses by Legislatures and Courts to Marvin

Responses by some legislatures and courts since *Marvin* was decided reflect serious concerns about the potential implications of the opinion.⁴⁶ Two states, Minnesota⁴⁷ and Tex-

42 See *supra* text accompanying note 27.

43 See *supra* text accompanying note 29.

44 But see *Donnell v. Stogel*, 560 N.Y.S.2d 200, 201 (N.Y. App. Div. 1990) (enforcing a contract between unmarried cohabitants who lived "together under the same roof as man and wife for 4 years").

45 See ALI PRINCIPLES (Proposed Final Draft 1997), *supra* note 5, § 5.15.

46 See generally Katherine C. Gordon, Note, *The Necessity and Enforcement of Cohabitation Agreements: When Strings Will Attach and How to Prevent Them—A State Survey*, 37 BRANDEIS L.J. 245 (1998-1999); George L. Blum, Annotation, *Property Rights Arising from Relationship of Couple Cohabiting Without Marriage*, 69 A.L.R.5th 219 (1999) (noting that states not recognizing the putative marriage doctrine formulate various methods for property distribution after dissolution).

47 MINN. STAT. § 513.075 (1998) (originally enacted in 1980). In the first reported case to deal with the statute, the Minnesota Supreme Court upheld the probate court's imposition of a constructive trust on a one-half interest in a home

as,⁴⁸ now deny enforcement of agreements between nonmarital cohabitants regarding property and financial arrangements that are not in writing. The Minnesota legislature also stripped its courts of jurisdiction over any claim rooted in cohabitation, absent a written agreement.⁴⁹ Texas took the simpler course of extending the requirement in its Statute of Frauds of a writing for "an agreement made on consideration of marriage" to apply as well to such an agreement made "on consideration of nonmarital conjugal cohabitation."⁵⁰

Courts in Florida and North Dakota have reached similar conclusions.⁵¹ The Florida Appellate Court stated that the Statute of Frauds applied to agreements for support between unmarried adults because of "the potential abuse in marital-type relationships."⁵² New York only enforces express agreements (either oral or written).⁵³ And Illinois denies enforcement altogether to cohabitation agreements.⁵⁴

In 1990, the Supreme Court of Pennsylvania provided additional support for private ordering by prospective spouses in *Simeone v. Sime-*

purchased with the joint funds of the cohabitants but with title taken in the name of the decedent, reasoning that the statute was not intended to apply where rights were asserted based on property "acquired for cash consideration wholly independent of any service contract related to cohabitation." *Estate of Eriksen*, 337 N.W.2d 671, 674 (Minn. 1983). However, subsequent appellate decisions have often distinguished *Eriksen* and have applied the statute to bar cohabitants' claims not based on the contribution of cash to the purchase of property. *See, e.g.,* *Hollom v. Carey*, 343 N.W.2d 701, 704 (Minn. Ct. App. 1984); *see also* *Obert v. Dahl*, 574 N.W.2d 747, 749-50 (Minn. Ct. App. 1998) (noting that subsequent cases from that court have distinguished or declined to apply *Eriksen*). The latest decision of the Minnesota Supreme Court reaffirms the conclusion in *Eriksen* that the statute does not bar claims of unjust enrichment based on financial contributions to the purchase price of property. *See* *Estate of Palmen*, 588 N.W.2d 493, 495-96 (Minn. 1999) (en banc).

48 TEX. FAM. CODE ANN. § 1.108 (Vernon 1998). In what appears to be the only reported case interpreting the statute, it was applied to deny an alleged same-sex partner's claim for relief after seventeen years of cohabitation. *See* *Zaremba v. Cliburn*, 949 S.W.2d 822, 829 (Tex. App. 1997). The statute is criticized in Buddy Brixey, Comment, *Texas Legislation on the Statute of Frauds in Palimony Suits: Is an Oral Contract Worth the Paper It's Written On?*, 25 HOUS. L. REV. 979, 980 (1988).

49 *See* MINN. STAT. § 513.076 (1998) (originally enacted in 1980). For comments criticizing the statute, see Kim Kantorowicz, Comment, *Contracts—Cohabitation in Minnesota: From Love to Contract—Public Policy Gone Awry in In Re Estate of Palmen*, 588 N.W.2d 493 (Minn. 2000), 26 WM. MITCHELL L. REV. 213 (1999); Mary L. Knoblauch, *Minnesota's Cohabitation Statute*, 2 LAW & INEQ. 335 (1984).

50 *Zaremba*, 949 S.W.2d at 829.

51 *See* *Posik v. Layton*, 695 So. 2d 759, 762 (Fla. Dist. Ct. App. 1997); *Kohler v. Flynn*, 493 N.W.2d 647, 649 (N.D. 1992).

52 *Posik*, 695 So. 2d at 762.

53 *See* *Morone v. Morone*, 413 N.E.2d 1154, 1156 (N.Y. 1980).

54 *See* *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1208-09 (Ill. 1979).

one, limiting judicial review of premarital agreements to "[t]raditional principles of contract law . . . where contracts are procured through fraud, misrepresentation, or duress" and rejecting any inquiry into the reasonableness of the provision for a spouse.⁵⁵ Last year, the California Supreme Court affirmed a lower court decision upholding a waiver of spousal support in a premarital agreement, despite the legislature's omission in its version of the Uniform Premarital Agreement Act (UPAA)⁵⁶ of section 3(a)(4), which expressly authorizes the modification or elimination of such support.⁵⁷ The court cited statutes or decisions in forty-one states and the District of Columbia that permit such waivers.⁵⁸

B. *The Movement from Status to Contract*

The movement from status to contract was heralded by Sir Henry Maine almost 135 years ago.⁵⁹ More recently, Wolfgang Friedman has asserted that in family law, "freedom of contract on the whole genuinely expresses social and economic liberation from traditional inequality and immobility . . . it is still necessary for the law to dismantle the remaining status fetters and to establish equality of legal capacities, of which freedom of contract is a significant expression."⁶⁰ Howard O. Hunter noted that the contract approach supports the intentions of the cohabitants, while the status approach imposes upon them obligations which they sought to avoid.⁶¹ Herma Hill Kay and Carol Amyx also support in general terms giving cohabitants freedom to structure the terms of their relationship, although they endorse judicial inquiries into the conduct of the parties as a basis for creating rights and obligations.⁶² They argue that the variety of familial relationships into which individuals are now entering should be legally supported in order to extend "increased dignity . . . to persons experimenting with new lifestyles."⁶³ And Twila Perry, although she does not favor requiring cohabitation agreements to be in writing, also crit-

55 581 A.2d 162, 165 (Pa. 1990).

56 UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 369 (1987).

57 See *Pendleton v. Fireman*, 5 P.3d 839, 845-47 (Cal. 2000).

58 See *id.* at 845.

59 HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN TIMES* 163-65 (London, Scribner 1861).

60 Wolfgang G. Friedmann, *Some Reflections on Status and Freedom*, in *ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND* 222, 236 (Ralph A. Newman ed., 1962).

61 Howard O. Hunter, *An Essay on Contract and Status: Race, Marriage, and the Merciticious Spouse*, 64 VA. L. REV. 1039, 1095 (1978).

62 See Kay & Amyx, *supra* note 17, at 968-73.

63 *Id.* at 973.

icized the status approach, because it fails to "preserve cohabitation as an alternative to marriage."⁶⁴

The movement from status to contract gained momentum from a variety of sources. In 1970, the Uniform Marriage and Divorce Act limited judicial review of separation agreements,⁶⁵ and the same decade brought path-breaking decisions in California⁶⁶ and Florida,⁶⁷ upholding terms of premarital agreements that undertook at the beginning of a marriage to anticipate and determine the consequences of divorce, rather than at its end. The UPAA, promulgated by the Commissioners on Uniform State Laws in 1983, undertook to remove many barriers to enforcement of such agreements⁶⁸ and has been adopted by over half of the states.⁶⁹

To be sure, the movement from status to contract was not without dissent, chiefly from academics.⁷⁰ Among the most vehement is Professor Grace Ganz Blumberg, one of the Reporters for the *Principles*. Blumberg contends that cohabitation does not reflect a choice not to marry but rather "just happens."⁷¹ She argues "that publicly created status is a much more suitable vehicle for handling support and property claims of unmarried and married cohabitants than is contract theory,"⁷² reasoning that cohabitants are in an unequal bargaining position because of the male's greater economic power.⁷³ Her view, reflected in somewhat modified form in the *Principles*, would attach marital status, for purposes of maintenance and property division, to cohabitants who have lived together for two or more years or for any

64 Perry, *supra* note 29, at 115.

65 See UNIF. MARRIAGE & DIVORCE ACT § 306, 9A U.L.A. 248-49 (1998).

66 See *In re Marriage of Dawley*, 551 P.2d 323, 333 (Cal. 1976) (rejecting the view that in order for an antenuptial agreement to be valid, the parties must contemplate a lifelong marriage).

67 See *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970).

68 See *infra* text accompanying notes 128-35.

69 See UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 89 (Supp. 2000).

70 See sources cited *infra* note 80; see also J. Thomas Oldham & David S. Caudill, *A Reconnaissance of Public Policy Restrictions upon Enforcement of Contracts Between Cohabitants*, 18 FAM. L.Q. 93, 98-106 (1984) (contending that a state's interest in ensuring that spouses are left with adequate financial resources and in preventing spouses and children from becoming wards of the state applies as well to protection of cohabitants). They suggest that agreements between de facto spouses (couples who cohabit for more than five years or have a child together) should be scrutinized in the same manner as agreements between lawful spouses. *Id.* at 121.

71 Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1135 (1981) (quoting J. TROST, UNMARRIED COHABITATION 63-64 (1979)).

72 *Id.* at 1163.

73 *Id.*

time period if the couple had a child.⁷⁴ She would even treat as marriage "a stable cohabitation of any duration ending in the death of one of the parties" for purposes of intestacy and elective share statutes.⁷⁵

Professor Blumberg's unsupported assertion that prospective cohabitants cannot readily find another person to bargain with⁷⁶ reflects a particular view of social reality. Undoubtedly, she is correct in assuming that some cohabitants do not feel free to leave an unsatisfactory relationship or to seek by bargaining to improve it. But surely there are others who are not similarly inhibited and who express their dissatisfaction with a relationship either by bargaining or by moving on to another partner. Nor does Blumberg address the possibility that treating cohabitation as if it were marriage may inhibit the development of relationships that could enrich both cohabitants' lives and that might evolve into marriage. Thus, the question for policy makers is whether protection of the interests of cohabitants in the first group is more important than freeing other cohabitants to structure their relationships to meet their individual needs.

II. COHABITATION AGREEMENTS UNDER THE *PRINCIPLES*

A. *The Principles' Imposition of Domestic Partnership Status*

When it undertook to expand its statement of the *Principles of Family Dissolution* to include unmarried cohabitants, the ALI had a unique opportunity to respond to a widely felt need for greater certainty and predictability in an increasingly important area of private ordering. The *Marvin* court admitted that its "past decisions hover over the issue in the somewhat wispy form of the figures of a Chagall painting."⁷⁷ Although the decision dispelled doubts as to the capacity of cohabitants in California to contract with each other, persisting uncertainties remain with respect to the willingness of courts there and elsewhere to revise or imply contracts to reflect judicial perceptions of fairness.⁷⁸

Suggested forms for nonmarital cohabitation agreements often contain caveats about the unsettled state of the law in this area.⁷⁹ Even if the parties enter into their relationship in a state such as Min-

⁷⁴ *Id.* at 1166.

⁷⁵ *Id.* at 1167.

⁷⁶ *Id.* at 1163.

⁷⁷ *Marvin v. Marvin*, 557 P.2d 106, 113 (Cal. 1976).

⁷⁸ See *supra* text accompanying notes 21-22.

⁷⁹ See, e.g., 2 ALEXANDER LINDEY & LOUIS I. PARLEY, LINDEY AND PARLEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 100.02 (2d ed. 2000).

nesota or Texas that requires a writing to create enforceable obligations based on nonmarital cohabitation, they may move to another state where no writing is required. If suit is brought in that state, it may apply its law, rather than that of the place where cohabitation commenced, and grant enforcement of an alleged express or implied agreement or other equitable relief despite the absence of a writing.

Instead of responding to these concerns and facilitating enforcement of agreements between nonmarital partners, the *Principles* march resolutely backward to status-based law.⁸⁰ If cohabitants share a primary residence and life together as a couple for three years (two years if they have a common child), the *Principles* would treat termination of the relationship as if it were the dissolution of a marriage, reasoning that "their course of conduct over a period of years subjects them to parallel rules."⁸¹

It is technically correct, of course, that "the recognition of inter se claims of domestic partners does not revive the doctrine of common-law marriage,"⁸² as a state's enactment of Chapter 6 would not affect relations between the partners and either third parties or governmental bodies. Nevertheless, the *Principles*' recognition of domestic partners would substitute an emphasis on status, very similar to common-law marriage, for the powerful contemporary movement to recognize the parties' freedom to contract about the terms of their relationship. And it would inject a troubling degree of uncertainty into the determination of when domestic partnership status exists.

B. Uncertainty as to When Domestic Partnership Status Exists

Even if neither the three-year nor the two-year test is satisfied, a cohabitant may nevertheless qualify for the full array of benefits provided on dissolution for qualifying marital partners by proving that the parties shared a primary residence for a significant period and lived together as a couple.⁸³ That determination is to be made by reference to "all the circumstances," including, *inter alia*, "(e) [t]he

80 In exalting status in this context, the ALI is by no means alone. See Blumberg, *supra* note 71, at 1128; David S. Caudill, *Legal Recognition of Unmarried Cohabitation: A Proposal to Update and Reconsider Common-Law Marriage*, 49 TENN. L. REV. 537, 556-59 (1982); H. Jay Folberg & William P. Buren, *Domestic Partnership: A Proposal for Dividing the Property of Unmarried Families*, 12 WILLAMETTE L. REV. 453, 479-84 (1976); William A. Reppy, Jr., *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 LA. L. REV. 1677, 1677 (1984).

81 ALI PRINCIPLES (Tentative Draft 2000), *supra* note 2, § 6.03. For the suggested time periods, see *id.* § 6.03, cmt. d.

82 *Id.* § 6.01 cmt. a.

83 *Id.* § 6.03(6).

extent to which the relationship wrought change in the life of either or both parties; [and] . . . (h) [t]he emotional or physical intimacy of the parties' relationship"84

Comment b to section 6.02 is likewise accurate in denying that the chapter seeks or is likely to encourage nonmarital relationships as an alternative to marriage, as the *Principles* would make economic consequences the same in each case.⁸⁵ What the *Principles* exempt from such treatment, and thus implicitly favor, are relationships that do not satisfy the threshold requirement that the parties share a primary residence. Thus, cohabitants who wish to avoid the burdensome financial consequences of domestic partnership under the *Principles* should either maintain separate primary residences, change partners at frequent intervals, or limit those consequences by agreement.

III. THE *PRINCIPLES*' IMPEDIMENTS TO CONTRACTING OUT OF DOMESTIC PARTNERSHIP STATUS

The barriers that the *Principles* would erect to enforcement of agreements between domestic partners, as well as premarital and marital agreements, are based chiefly on aspects of the contract doctrines of duress and unconscionability:⁸⁶ (1) procedural defects in the bargaining process, including unfair negotiating tactics; (2) substantive defects, or "a gross one-sidedness in terms."⁸⁷

Section 6.01(2) requires agreements between domestic partners to satisfy the requirements of Chapter 7,⁸⁸ which generally is couched in language applicable to premarital agreements, although some specific references reflect inherent differences in the two kinds of agreements.

The following discussion will contrast the *Principles*' impediments to enforcement of both kinds of agreements with the less restrictive requirements embodied in the UPAA.⁸⁹

A. *Procedural Requirements*

Before undertaking to analyze the burdens that section 7.05 would impose on a party seeking enforcement of a premarital agreement or an agreement between domestic partners, it is important to contrast the situations of the parties to the two types of agreements.

84 *Id.* § 6.03(7)(e), (h).

85 *See id.* § 6.02 cmt. b.

86 *Id.* § 7.01 cmt. a.

87 *Id.* § 7.01 cmt. d.

88 *See id.* § 6.01(2).

89 UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 369 (1987).

In marriage (excluding common-law marriages in the minority of states that recognize them—less than one-fourth⁹⁰), the legal relationship has a clear starting date with the wedding, whether it is a large social event or an informal ceremony before a justice of the peace. In contrast, cohabitation may have no clear starting point. One commentator has asserted:

Most cohabitation evolves from a drift into sleeping more and more frequently together and a gradual accumulation of possessions at one residence. If and when a decision with conscious deliberation is made, it is usually precipitated by some external force, such as the end of the term, graduation, a change of job, a need for housing, or reduced income.⁹¹

At present, a more important difference between termination of marriage and of cohabitation is that state law is quite explicit as to the legal consequences of the former, in the absence of an enforceable premarital agreement, even though the precise contours of the property and support rights of a former spouse usually are determined by the exercise of judicial discretion. In contrast, in only a few states may certain acquisitions during some cohabitations be divided, in the court's discretion, when the relationship ends.⁹² In other states, the financial consequences that follow termination of such a relationship are even less predictable. They depend both on the willingness of a court to apply the principles of *Marvin* to give effect to an express or implied contract of the parties or to grant other equitable relief and the manner in which such principles are applied. Thus parties to a premarital agreement contract in the light of an explicit default rule, whereas contracting domestic partners in the great majority of states generally do not, unless the state adopts Chapter 6 or some counterpart.

Section 7.05 creates three procedural hurdles for a party *seeking* enforcement of premarital and marital agreements, as well as agreements between domestic partners, none of which are found in the UPAA.⁹³

(1) Under section 7.05(2), the party seeking enforcement bears the burden of proving that the other party's consent was informed and not obtained under duress.⁹⁴ In contrast, section 6 of the UPAA

90 For a list, see IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 65–66 (3d ed. 1998).

91 Eleanor D. Macklin, *Nonmarital Heterosexual Cohabitation*, *MARRIAGE & FAM. REV.*, Mar.–Apr. 1978, at 1, 6, *quoted in* Blumberg, *supra* note 71, at 1135 n.70.

92 See *supra* text accompanying notes 35–36.

93 ALI PRINCIPLES (Tentative Draft 2000), *supra* note 2, § 7.05.

94 See *id.* § 7.05(2).

requires the party *resisting* enforcement to prove either lack of voluntary execution or unconscionability.

(2) In order to enjoy the benefit of a rebuttable presumption that the requirements of informed consent and freedom from duress are satisfied, under section 7.05(3) the party seeking enforcement must prove (a) that the agreement “was executed at least 30 days before the parties’ marriage;” (b) “both parties were advised to obtain independent legal counsel, and had reasonable opportunity to do so . . .”; and (c)

in the case of agreements concluded without . . . [such] counsel for each party, the agreement states, in language easily understandable by an adult of ordinary intelligence with no legal training,

(i) the nature of any rights or claims . . . altered . . . and the nature of that alteration, and

(ii) that the interest of the spouses . . . may be adverse.⁹⁵

(3) Finally, section 7.05(5) requires a party, in order “[t]o enforce terms that limit claims . . . to compensatory payments, or to share in marital property, [to] . . . show that . . . the other party knew, at least approximately, [his] assets and income”⁹⁶ Under UPAA section 6(a), the burden is on the party resisting enforcement to prove nondisclosure of assets and no waiver of disclosure.⁹⁷

For agreements between domestic partners, there is no analog to the requirement that a premarital agreement be executed at least thirty days before the parties’ marriage. Instead, either party can rescind within thirty days of execution of the agreement.⁹⁸

1. Proving Informed Consent and Absence of Duress

Comment *b* acknowledges that the usual contract rules place the burden of proving duress on the party challenging the agreement and do not require the other party to prove that his consent was “informed.”⁹⁹ The *Principles* give two reasons for shifting the burden for both prospective spouses and nonmarital cohabitants in these matters: (1) “[m]ost parties contemplating marriage focus their attention on the life they anticipate sharing with their intended spouse, not on financial aspects of a marital dissolution they do not expect to occur,”

⁹⁵ *Id.* § 7.05(3)(a)–(c).

⁹⁶ *Id.* § 7.05(5).

⁹⁷ UNIF. PREMARITAL AGREEMENT ACT § 6(a)(2), 9B U.L.A. 376 (1987).

⁹⁸ ALI PRINCIPLES (Tentative Draft 2000), *supra* note 2, § 7.05(4).

⁹⁹ *Id.* § 7.05 cmt. b.

and¹⁰⁰ (2) "premarital agreements typically alter claims the parties would otherwise have on one another under applicable law"¹⁰¹

In the case of either kind of agreement, the reasons given for shifting the burden of proof are equally unpersuasive. While the party against whom enforcement is sought may have been focusing on other matters when the agreement was signed, that factor does not keep his consent from being "informed" nor justify placing the burden of proving that it was informed on the other party. And to assert that the agreement alters claims the parties would otherwise have made necessarily assumes that cohabitation or marriage would take place whether or not the agreement was signed. In many litigated cases, it seems quite likely that without the premarital agreement there would have been no marriage and, hence, no claims to be altered, except as a domestic partner. Indeed, the spouse resisting enforcement does so in part on the ground of alleged duress resulting from the refusal of the other spouse to proceed with the marriage, unless the agreement was signed.¹⁰² And if the *Principles* became law in a given jurisdiction, cohabitants whose partners refuse to sign an agreement may choose to end the relationship before the time period required to create legal obligations has passed. Thus again, the agreement does not alter obligations the parties would otherwise have.

Whether the second statement applies to domestic partners is open to debate. As the preceding discussion brought out, the claims that domestic partners have on termination of a relationship usually are unclear, depending on the willingness of a court to apply the principles laid down in *Marvin*, as well as the manner in which the court does so. Thus, it is difficult to say exactly what claims are altered by a domestic partnership agreement,¹⁰³ although of course legislative or judicial adoption of the *Principles* would change this.

The "plain language" requirement of section 7.05(3)(c)¹⁰⁴ would create a trap for any proponent so ill-advised as to fail to afford the other party opportunity to obtain independent legal counsel.¹⁰⁵ Of

100 *Id.*

101 *Id.*

102 See, e.g., *In re Marriage of Spiegel*, 553 N.W.2d 309, 316-18 (Iowa 1996); *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990).

103 See *supra* text accompanying notes 35-36.

104 ALI PRINCIPLES (Tentative Draft 2000), *supra* note 2, § 7.05(3)(c).

105 In many cases, a "plain language" requirement would be extremely difficult to satisfy. The ALI provides an illustration which purports to do so in the relatively simple situation in which the agreement undertakes merely to make clear that no marital property rights will arise from the marriage. See *id.* § 7.05 cmt. f, illus. 10. However, this illustration 10 fails to reflect section 4.05(1), under which a portion of any increase in the value of separate property is divisible on divorce "whenever either

course it may be a foregone conclusion that concerns about possible liability for malpractice are highly likely to lead counsel to routinely advise the party whose rights would be diminished not to sign the agreement. It is somewhat puzzling, however, that, read literally, the section provides that the party against whom enforcement is sought could resist application of the rebuttable presumption of informed consent on the ground that the proponent did not have the opportunity to obtain independent counsel.¹⁰⁶ A rebuttable presumption that this requirement has been satisfied arises when the party seeking enforcement shows that “both parties were advised to obtain independent legal counsel, and had reasonable opportunity to do so, before the agreement’s execution.”¹⁰⁷ Thus, if the party seeking enforcement did not obtain or have a reasonable opportunity to obtain independent legal counsel, the rebuttable presumption does not arise.

2. Disclosure of Assets and Income

The requirement in section 7.05(5) that the proponent show that the other party knew his approximate assets and income is seriously objectionable if, as plainly appears, it is intended to be nonwaivable.¹⁰⁸ Section 7.05(5) purports to create a safe harbor in satisfying the disclosure requirement by a showing that

prior to signing the agreement the party seeking to enforce it provided the other party with a written statement accurately listing

spouse has devoted substantial time during marriage to the property’s management or preservation.” ALI PRINCIPLES (Proposed Final Draft 1997), *supra* note 5, § 4.05(1). And the suggestion that the lawyer might add language explaining that inherited property is not usually divided “[i]f relevant to the parties’ situation,” ALI PRINCIPLES (Tentative Draft 2000), *supra* note 2, § 7.05 cmt. f, illus. 10, is puzzling for two reasons. First, it is directly contradicted by section 4.18, which gradually converts separate property into marital property, including property inherited during marriage. ALI PRINCIPLES (Proposed Final Draft 1997), *supra* note 5, § 4.18. Second, there is no guidance as to when an explanation with reference to inherited property is “relevant.” How can the drafter anticipate the possibility of inheritance by either spouse, and if so, on what basis? And a “plain English” statement explaining a waiver of the right to compensatory payments on dissolution under all five headings in chapter 5 would be next to impossible to draft. Thus, the net effect of the “plain English” requirement is to cast serious doubt on the validity of almost every agreement drafted without independent legal counsel for each party.

106 Under section 7.05(2), the party seeking enforcement “must show that the other party’s consent to it was informed and not obtained under duress.” ALI PRINCIPLES (Tentative Draft 2000), *supra* note 2, § 7.05(2).

107 *Id.* § 7.05(3)(b) (emphasis added).

108 *See id.* § 7.05(5).

- (i) his or her significant assets, and their total approximate market value;
- (ii) his or her approximate annual income for each of the preceding three years; and
- (iii) any significant future acquisitions, or changes in income, to which the party has a current legal entitlement, or which the party reasonably expects to realize within three years of the agreement's execution.¹⁰⁹

However, recent stock market turbulence and the rapidly changing prospects of new business ventures underscores the difficulty in either determining the "approximate market value" of restricted stock, which lacks such a market, or predicting the future income of an executive whose fortunes are linked to a small business. Viewed with the omniscience of hindsight, the most conscientious attempt at disclosure in these cases may be deemed inadequate.

Comment *g* seeks to justify the *Principles'* intrusive requirement of disclosure of assets by asserting, inaccurately, that it "is nearly universal under existing law,"¹¹⁰ citing UPAA section 6(a), but omitting any reference to section 6(a)(2)(ii), which expressly authorizes disclosure to be waived. The reasons for recognizing such a waiver were persuasively stated by the Florida Supreme Court in *Stregack v. Moldofsky*, upholding an express legislative negation of a disclosure requirement in order for a premarital agreement to be valid in probate.¹¹¹ "Many older Florida residents want to marry again but also want to keep their assets separate [The statute] allows complete control over assets accumulated over a lifetime without fear that a partial disclosure before marriage may trigger an unwanted disposition of those assets."¹¹²

B. Substantive Requirements for an Enforceable Agreement

Agreements that successfully surmount the rigorous procedural hurdles in section 7.05 may still be subject to intrusive substantive review under section 7.07.¹¹³ That section directs the court to deny enforcement of a term in an agreement if its enforcement would "work a substantial injustice within the meaning of this section,"¹¹⁴ which, like any invocation of "fairness" as a basis for decision, has intuitive ap-

109 *Id.*

110 *Id.* § 7.05 cmt. g.

111 474 So. 2d 206, 207 (Fla. 1985).

112 *Id.*

113 ALI PRINCIPLES (Tentative Draft 2000), *supra* note 2, § 7.07.

114 *Id.* § 7.07(1).

peal.¹¹⁵ However, section 7.07(2) paints the circumstances under which a court should consider denying enforcement on this ground with an extremely broad brush.

Either of the following events would trigger that review: (1) passage of more than a fixed number of years¹¹⁶ (comment *b* suggests "about 10");¹¹⁷ or (2) birth or adoption of a child by the parties, if they had no children in common when the agreement was executed.¹¹⁸

In addition, section 7.07(2)(c) provides a breathtakingly broad catch-all basis for intrusive judicial review, if it has not already been set in motion by (1) or (2):

the circumstances have changed, the change is significant in evaluating the impact of the agreement on the parties or their children, and it is likely that individuals would be unable, at the time of execution, to anticipate the new circumstances, or their impact upon the individual's evaluation of the agreement's terms.¹¹⁹

In attempting to justify the remarkable constraints section 7.07(2)(c) would place on individuals structuring their relationships, the *Principles* asserts that people make mistakes in evaluating information and in underestimating risks of adverse developments and that these factors may be particularly likely to be present when a premarital agreement is signed.¹²⁰ Support for this conclusion is based on a survey of recent applicants for a marriage license who had not previously been married.¹²¹ Not surprisingly, the median response estimated correctly that fifty percent of American marriages would end in divorce, but predicted that the chance that the respondent's own marriage would end in divorce was zero.¹²² The respondents' optimism extended as well to the consequences of divorce in their own cases, as compared to the general population, as to obtaining custody of children, to securing alimony if they requested it, and to compliance by their spouse with court orders with respect to alimony and child support.¹²³

115 See *supra* text accompanying notes 21–22.

116 ALI PRINCIPLES (Tentative Draft 2000), *supra* note 2, § 7.07(2)(a).

117 *Id.* § 7.07 cmt. b.

118 *Id.* § 7.07(2)(b).

119 *Id.* § 7.07(2)(c).

120 See *id.* § 7.07 cmt. b.

121 See *id.* § 7.07 Reporter's Notes cmt. b (citing Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439 (1993)).

122 See ALI PRINCIPLES (Tentative Draft 2000), *supra* note 2, § 7.07 cmt. b.

123 *Id.*

There are at least two responses to the *Principles'* contention that the cognitive dissonance of engaged couples blinds them to the risk that their marriage will end in divorce and hence leads them to give less attention to a proposed premarital agreement than its potential importance warrants. Professor Kip Viscusi has provided the first with respect to "optimism bias" and "cognitive dissonance" in the context of warnings to consumers. "Much of the source of the apparent optimism bias may be a result of the framing of the risk question . . . in effect ask[ing] people to find fault with themselves, something that most people are unwilling to do."¹²⁴

Viscusi points out that people's actions, in relation to risky jobs and hazardous products, are consistent with a much greater awareness—indeed, in some instances, a substantial overvaluation of the decrease in risk from buying safer products—than their responses to questions that invite them to find fault with themselves.¹²⁵ If Viscusi's insight into the effect of different ways of framing the question were applied to a survey of engaged couples or prospective domestic partners, they might be asked not to assess the risk that their relationship might fail, which in effect asks them to find fault with themselves, but rather, to assess what premium they would pay for a large insurance policy to cover the financial and emotional losses of divorce or termination of the domestic partnership. A fiancée's or partner's willingness to pay a substantial premium for such protection would be a far better indication of how she assesses the risk that her relationship might end than questions that require her to find fault with herself by acknowledging that her choice of partner may be a mistake.

A second weakness in the *Principles'* reliance on cognitive dissonance of engaged couples lies in the characteristics of the group. The most appropriate group for the study should not include *all* applicants for marriage licenses, but rather only those who have been asked by their prospective spouses to sign a premarital agreement dealing with the consequences of divorce. Such a request surely signals some doubt by the proponent of the agreement about the success of the marriage, and an extraordinary degree of cognitive dissonance would be required in order for the prospective partner to ignore that signal. Although there appears to be no published results of any comparable survey of cohabitants, it seems intuitively likely that they would be even more inclined than prospective spouses to recognize the very real possibility that the relationship might not last.

124 W. Kip Viscusi, *Using Warnings to Extend the Boundaries of Consumer Sovereignty*, 23 HARV. J.L. & PUB. POL'Y 211, 226–28 (1999).

125 See *id.* at 218–28.

More fundamentally, the ALI does not fully explore the possible adverse consequences of making enforcement of premarital agreements substantially more difficult and unpredictable than it is today in the states that have adopted the UPAA and in others, such as Pennsylvania,¹²⁶ where enforcement is more likely to be the rule than the exception. If prospective spouses know that chances for enforcement of a proposed agreement are uncertain, the marriage may not take place, even though both parties are convinced that marriage on the proposed terms would make them happier than not marrying. The same reasoning is equally applicable to potential domestic partners.

Comment *b* also seeks to justify strict scrutiny of premarital agreements by characterizing them as having no immediate consequences. In order for this statement to be accurate, the permissible scope of such agreements could not include, as it does under UPAA subsections 3(a)(1) and (2), ownership and control of property during marriage.¹²⁷ The *Principles* neither acknowledge nor undertake to rationalize this limitation.

In contrast to the *Principles'* intrusive substantive review, the review provided by UPAA section 6(a)(2) does not treat unconscionability, without more, as a defense to enforcement of an agreement. In addition to proving unconscionability, the party resisting enforcement must show that she

- (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
- (ii) did not voluntarily . . . waive . . . any right to disclosure . . . beyond [that] provided; and
- (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.¹²⁸

Moreover, section 6(a)(2) makes explicit that unconscionability is tested at the time of execution, and the comment to this section states that "a premarital agreement is enforceable if enforcement would not have been unconscionable at the time the agreement was executed."¹²⁹ Despite this seemingly clear language, the Reporter's Note to section 7.07 of the *Principles* states that the official comment is confusing as to whether unconscionability should be determined at the time of the agreement or when enforcement is sought.¹³⁰

126 See *supra* text accompanying note 55.

127 See UNIF. PREMARITAL AGREEMENT ACT § 3, 9B U.L.A. 373 (1987).

128 UNIF. PREMARITAL AGREEMENT ACT § 6(a)(2), 9B U.L.A. 376 (1987).

129 *Id.* § 6 cmt. (citations omitted).

130 See ALI PRINCIPLES (Tentative Draft 2000), *supra* note 2, § 7.07, Reporter's Note cmt. b. The "confusion" is said to stem from two sources. First is the citation in

The legislative history of the UPAA clearly establishes that the time of execution is controlling. The debate over unconscionability at the meeting on the UPAA of the National Conference of Commissioners on Uniform State Laws was spirited, and motions similar to the ALI's treatment of unconscionability were made. One committee member proposed adding the following language: "A premarital agreement is not enforceable to the extent that enforcement would be unconscionable at the time of enforcement unless the party against whom enforcement is sought had the advice of legal counsel at the time the agreement was executed."¹³¹ The proposal was rejected by a voice vote.¹³² Later in the proceedings, "a sense of the house motion that unconscionable agreements cannot be enforced, even if notice has been given to the other party," was proposed and defeated.¹³³

The reason that the committee resisted expanding unconscionability was clearly stated by one of the commissioners.

This is an area of the law where there is a great deal of uncertainty at the present time with respect to enforceability, and it's one that is most troublesome to practitioners in the domestic relations field I can say the situation in Arkansas is that you never know whether or not the court is going to decide that the agreement was unconscionable, without regard to any of these other factors. There may have been disclosure, full knowledge, but the court states at a later date that it was unconscionable. Even though you say that they should decide it at the time the agreement was made, they decide it at the time when it is before them.

We think that we have got protection in the other elements, and that you shouldn't be leaving that gate open, that it can always be argued that in spite of everything you did, all the disclosure you made—the court suddenly ten years later decides that it was unconscionable.

the UPAA's comment to section six to a case in which unconscionability was tested at the time of dissolution of the marriage. Second is the quotation, in the same comment, of section 306 of the Uniform Marriage and Divorce Act, which states that "the court may look to the economic circumstances of the parties resulting from the agreement." UNIF. MARRIAGE & DIVORCE ACT § 306 cmt., 9A U.L.A. 250 (1998), *quoted in* UNIF. PREMARITAL AGREEMENT ACT § 6 cmt., 9B U.L.A. 377 (1987). However, as the reporter notes, this language refers to separation agreements and is therefore irrelevant to a discussion of premarital agreements. *See* ALI PRINCIPLES (Tentative Draft 2000), *supra* note 2, § 7.07 Reporter's Note cmt. b. To find confusion in this context is to exalt one of the many cases cited in the comment to UPAA section six and a clearly inappropriate quotation over the explicit language of the provision and comment.

131 UNIF. ANTENUPTIAL AGREEMENTS ACT 62 (July 23, 25–26, 1983).

132 *Id.* at 63.

133 *Id.* at 80.

That's what we are trying to avoid. We're trying to put in an element of certainty and actual protection, to a maximum degree.¹³⁴

Similar reasoning should inform the treatment of agreements between domestic partners.

CONCLUSION

The *Principles* reflect policies favored by a small group of legal academics, rather than the mainstream of developing American law governing cohabitants. The National Conference of Commissioners on Uniform State Laws and state legislatures should respond to the widely felt need for greater certainty and predictability in this area by specifying the circumstances under which cohabitants have claims against each other when their relationship ends and the manner in which such claims can be modified or eliminated. For example, compensation may be appropriate for a cohabitant who pays for education or training of the other party.¹³⁵ Whether the UPAA is an appropriate instrument for this purpose and whether any revisions in the Act are appropriate in the light of almost two decades experience with it are questions for another day.

134 *Id.* at 70.

135 *See supra* text accompanying note 45.